BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

Directed to: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

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Table of Contents

SUMMARY

Viacom International Inc. is a diversified entertainment company which owns and operates satellite-delivered program services. It is filing these reply comments in an effort to ensure that whatever regulations the FCC adopts in this proceeding are applicable to satellite licensees and not to distributors or programmers, and to further ensure that the FCC imposes only a minimum level of regulation on the emerging DBS industry, without disrupting the existing contractual relationships between DBS service providers and programmers.

With respect to the noncommercial channel reservation requirements in Section 335(b) of the Communications Act of 1934, as amended, Viacom agrees with those commenting parties who argue that, as to Part 100 DBS facilities, only Part 100 licensees may be held responsible for complying with those obligations. Viacom does not, however, agree with those commenting parties who argue that, as to Part 25 DBS facilities, a distributor who leases transponder capacity, but does not hold a Part 25 license, may be also responsible for complying with those obligations. The fact that Section 335(b)(1) requires the FCC to impose noncommercial channel reservation obligations as a condition of "any provision, initial authorization, or authorization renewal . . ." demonstrates that Congress intended those obligations to attach to FCC licensees only (Part 100 or Part 25). Further, applying noncommercial channel reservation obligations to Part 25 distributors rather than Part 25 licensees would be inconsistent with other portions of the statute dealing with the calculation

of reserved capacity, and generally would create unjustified differences between the regulatory schemes for Part 100 and Part 25 licensees.

Viacom also submits that Section 335(b) must not be applied in a manner which permits DBS service providers to abrogate their existing program supply contracts in favor of noncommercial users. There is no evidence that Congress intended to permit Section 335(b) to supersede existing program supply contracts. Moreoever, contract abrogation will inhibit the development of the emerging DBS industry, and will have a further significant, adverse economic effect: a programmer whose contract is abrogated may be unable to satisfy its commitments to third parties which were undertaken in reliance on the existence of the very contracts being abrogated.

With respect to the political broadcasting requirements in Section 335(a), Viacom recommends that (i) the definition of "provider of direct broadcast satellite service" for purposes of Section 335(a) should be the same as that for Section 335(b); (ii) Section 335(a) should not be applied in a manner which imposes political broadcasting obligations on programmers, or which permits abrogation of program supply contracts, or which requires carriage of political advertising on commercial-free channels; and (iii) the FCC <u>not</u> impose "lowest unit charge" requirements on DBS at this time.

Finally, Viacom supports the FCC's tentative view that no public interest requirements other than those specifically identified in Secitons 335(a) and (b) be imposed on DBS at this time.

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REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. ("Viacom") herein submits its reply comments on the FCC's Notice of Proposed Rule Making ("NPRM")[1/] in the above-captioned proceeding. Viacom is a diversified entertainment company which owns and operates, directly or through subsidiaries, satellite-delivered program services, including Showtime, The Movie Channel, MTV: Music Television, Nickelodeon, VH1/Video Hits One and FLIX (the "Program Services"). In addition, Viacom also owns and operates cable television systems and television and radio broadcast stations; is engaged in the syndication of feature film, first-run and off-network programming; and is engaged in the production of both network and first-run television programs.

As reported in the trade press, Viacom, through its Showtime Networks Inc. subsidiary and through its MTV Networks division,

DBS subscribers. By virtue of its status as a Part 100 licensee, USSB is subject to the requirements set forth in Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), 47 U.S.C. § 335.

Viacom therefore has a substantial interest in ensuring that any rules the FCC adopts in this proceeding (a) do not cause disruption to the Program Services, (b) protect any contractual rights any Viacom entity has bargained for, and (c) do not threaten the viability of yet-to-be initiated DBS systems. For the reasons set forth below, Viacom believes that these ends can best be achieved, consistent with the purposes and provisions of the 1992 Act, by applying the requirements of the 1992 Act to DBS licensees and not to programmers, and by imposing no more regulation on DBS licensees and their relationships with programmers than is required under the 1992 Act so that an as-yet uninitiated but promising technology will have the opportunity to develop without being unduly hampered by unnecessary regulation.

I. THE SECTION 335(b)(5) DEFINITIONS OF "PROVIDER OF DIRECT BROADCAST SATELLITE SERVICE" APPLY ONLY TO THE LICENSEES OF PART 100 OR PART 25 FACILITIES.

Section 335(b)(1) imposes noncommercial channel reservation requirements on a "provider of direct broadcast satellite service." Under Section 335(b)(5), the term "provider of direct broadcast satellite service" is defined to encompass two types of entities: "a licensee for a Ku-band satellite under part 100 . . ." and "any distributor who controls a minimum number of channels

. . . using a Ku-band fixed service satellite system for the provision of video programming directly to the home and licensed

Section 335(b)'s noncommercial channel reservation requirements for DBS service provided under Part 25 of the rules should also be that of the licensee. For example, APTS and Primestar Partners argue that the responsibility should rest with the Part 25 licensee (see APTS Comments at 6-10 and Primestar Comments at 6-7), whereas GTE Spacenet Corporation argues that the responsibility should be imposed on distributors who use Part 25 DBS facilities but not on Part 25 licensees (see GTE Spacenet Comments at 3-4). For the reasons set forth below, Viacom urges that the position taken by APTS and Primestar is the correct one, and that the FCC therefore should hold Part 25 licensees responsible for complying with Section 335(b)'s noncommercial channel reservation requirements.

Although the statutory definition of the term "provider of direct broadcast satellite service" pertaining to Part 25 refers to a "distributor," it is unclear why Congress used the term "distributor" instead of "licensee" when addressing Part 25 DBS service providers.[3/] Accordingly, Viacom submits that the term

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3/ The term "distributor" is not defined in the final version of Section 335 or in the Conference Report to the 1992 Act, and the Conference Report does not discuss why the House-Senate

"distributor" makes the Part 25 definition of "provider of direct broadcast satellite service" ambiguous and that the FCC must therefore look to Section 335(b) as a whole in order to determine the proper scope of the Part 25 definition.

Viacom submits that interpreting the Part 25 definition as applying to unlicensed distributors using Part 25 DBS satellites, rather than to Part 25 licensees, would be flatly inconsistent with Congress's chosen method of enforcing Section 335(b)'s noncommercial channel reservation obligations. See Comments of APTS at 7; Comments of Primestar Partners at 9. Section 335(b)(1) states that the FCC is to impose noncommercial channel reservation obligations as a condition of "any provision, initial authorization, or authorization renewal . . . ." 47 U.S.C. § 335(b)(1). Clearly the FCC cannot impose noncommercial channel

non-licensed Part 25 distributors would also be inconsistent with the method set forth in Section 335(b)(1) for calculating the required number of reserved channels as a percentage of total system channel capacity rather than as a percentage of the capacity leased by each user. See Conference Report at 100 ("The conferees intend that the Commission consider the total channel capacity of a DBS system in establishing reservation requirements.").[5/]

[4/](...continued)
to providers of DBS service, and suggests that the file be maintained and accessible at the headquarters of the provider of DBS service. NPRM at ¶ 28. Part 25 distributors could not maintain a single political file at a centralized location, since there can be multiple distributors using Part 25 facilities, which operate from multiple headquarters scattered throughout the United States. The only logical entity that could maintain a single political file is the DBS licensee, and any scheme under which that single entity must solicit and verify political file material from multiple distributors throughout the country would impose excessive burdens of data collection and verification. These considerations further militate in favor of interpreting all of the provisions of Section 335 as imposing obligations on the licensees of the facilities, and not on distributors (unless they are also licensees).

[5/] Accepted canons of statutory construction also support the conclusion that the Part 25 definition of "provider of direct broadcast satellite service" applies to Part 25 licensees only. It is well settled that a statute's words are the first point of reference for interpreting a statute, and that the words must be interpreted in a manner which does not render other portions of the statute superfluous. Park 'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985); Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 837 (1988). The statutory definition applicable to Part 25 states that a "provider of direct broadcast satellite service" is "any distributor who controls a minimum number of channels . . . using a Ku-band fixed service satellite system for provision of video programming directly to the home and licensed under Part 25 . . . ." Applying the above-stated principles to the quoted language, the phrase "who controls a minimum number of channels . . . using a Ku-band fixed service satellite system for the provision of video
(continued...)

In addition, reading the term "distributor" without reference to the term "licensed" will produce an odd dichotomy: unlicensed distributors of Part 25 facilities would be subject to Section 335(b)'s noncommercial channel reservation requirements, but unlicensed distributors using Part 100 facilities would not. Conversely, Part 100 licensees would be subject to the noncommercial channel reservation requirements, but Part 25 licensees would not. Nothing in Section 335 or its legislative history suggests that Congress intended to establish such a bifurcated regulatory scheme, and the FCC should not assume such an intent by virtue of Congress's use of a single unexplained term in the statute.[6/]

[5/](...continued)
programming directly to the home" would appear to be a single phrase limiting the Part 25 "distributors" to which Section 335(b) applies. Under this grammatical construction, the phrase "and licensed under Part 25 . . ." constitutes an additional independent phrase further modifying the term "distributor" and not a dependent phrase modifying the term "fixed service satellite system." Viacom submits that this construction is the only one which gives meaning to every word in the definition: the phrase "and licensed under Part 25 . . ." is superfluous if it modifies "fixed service satellite system," since all such systems are licensed under Part 25.

[6/] In support of its position that the noncommercial channel reservation requirements should be applied to Part 25 distributors rather than Part 25 licensees, GTE Spacenet cites the following language from the House Report: "The Committee does not intend that the licensed operator of the DBS satellite itself be subject to the requirements of this subsection unless it seeks to provide video programming directly." GTE Spacenet Comments at 4, citing H.R. No. 102-628, 102d Cong., 2d Sess at 124 ("House Report"). While this language is one indication of Congressional intent, there are a number of reasons why it should not be dispositive here. First, reading the quoted language as suggested by GTE Spacenet would require the FCC to also exempt Part 100 licensees from the noncommercial channel reservation
(continued...)

Moreover, as already pointed out by APTS, imposition of noncommercial channel reservation requirements on non-licensed Part 25 distributors would pose a number of enforcement and logistical problems. As a practical matter, it will be much easier for the FCC to enforce those requirements efficiently if it employs the same regulatory regime for Part 100 and Part 25 satellites. See Comments of APTS at 9. Further, it is unclear how the FCC can condition the issuance or renewal of a Part 25

Accordingly, Viacom believes that the appropriate resolution of this issue is for the FCC to impose Section 335(b)'s noncommercial channel reservation obligations solely on Part 100 and Part 25 licensees, and, as required under Section 335(b)(1), condition the issuance or renewal of Part 100 and Part 25 licenses on compliance with those obligations. As suggested by Primestar Partners, a Part 25 licensee should be permitted to negotiate contractual terms under which a distributor may agree to assume some or all of the statutory obligations. Comments of

II. THE NONCOMMERCIAL CHANNEL RESERVATION REQUIREMENTS

A. The FCC Should Adopt the Least Restrictive Regulatory Scheme Possible.

The FCC has recognized in the NPRM that DBS is in its "early stage of development" and hence would not benefit from an intrusive regulatory scheme at this time. NPRM at ¶ 29. For this reason, Viacom submits that the FCC should apply Section 335(b)'s noncommercial channel reservation requirements in a manner which accomplishes Congressional objectives, without unduly impairing the economic viability of DBS. In this regard, it is important to note that Section 335(b) requires DBS service providers to offer transponder capacity to noncommercial programmers at rates below cost. Clearly, the objective of guaranteeing noncommercial programmers access to DBS facilities cannot be accomplished if implementing such guarantees puts the economic viability of DBS at risk. Viacom therefore recommends that the FCC require DBS service providers to reserve only the minimum percentage of channel capacity required under Section 335(b) for noncommercial use (i.e., 4%). Further, as discussed in greater detail below, Viacom urges the FCC not to permit DBS service providers to abrogate existing program supply contracts in favor of Section 335(b)'s noncommercial channel reservation requirements.[7/]

[7/] In this context, Viacom intends "abrogation" to encompass (1) total rescission of a program supply contract, and (2) any modification of a program supply contract which amends the original terms of carriage bargained for in the contract.

B. The Noncommercial Channel Reservation Requirements Must Not Be Applied in a Manner Which Permits Contract Abrogation.

Some commenting parties have argued that Section 335(b)'s noncommercial channel reservation requirements supersede any program supply contracts (including affiliation agreements) between DBS service providers and programmers and that such contracts therefore should not be grandfathered. See Comments of APTS at 19; Comments of Hispanic Information and Television Network at 13. At no point in Section 335 or its legislative history does Congress state that any existing program supply contracts between DBS service providers and programmers may be

respect existing contractual arrangements between DBS providers and programmers. It would be a tortured reading of the statute to suggest that a DBS service provider must "reserve" for noncommercial purposes channels that have already been "reserved" pursuant to program supply contracts.

Moreover, Section 335(b)(2) states that "A provider of [DBS] service may utilize for any purpose any unused channel capacity required to be reserved under this subsection pending the actual use of such channel capacity for noncommercial programming...." 47 U.S.C. § 335(b)(2). This provision appears to assume that all reserved noncommercial channels are unoccupied to begin with, since a channel already devoted to a programmer cannot be considered "unused."

Viacom also submits that the FCC should not underestimate the potential disruption to programmers if the FCC allows existing program supply contracts with DBS service providers to be abrogated. Once a program supply contract with a programmer is abrogated and its programming is removed in whole or in part in favor of a noncommercial channel, the programmer will likely be unable to meet the anticipated subscription and revenue levels upon which its other contractual commitments have been predicated. For example, premium programmers have already agreed to pay license fees to studios and other program suppliers in anticipation of meeting those subscription and revenue levels, and the failure to meet such levels may result in the programmer's inability to pay such license fees. Similarly, a

non-premium programmer that is removed in whole or in part will face the same or similar consequences from the loss of subscription and revenue levels and, in addition, will likely be unable to meet the viewership levels it has guaranteed to advertisers, thereby subjecting itself to refund and make-good obligations. Thus, assuming that either a premium or non-premium programmer is unable to terminate or modify its existing contracts with studios, program suppliers and others, abrogation of program supply contracts will have a significant, adverse economic effect: in addition to losing revenue, the programmer may be unable to satisfy its commitments to third parties which were undertaken in reliance on the existence of the very contracts that are being abrogated.[9/]

Viacom also reiterates that in view of DBS's status as a start-up industry, the FCC should avoid taking any action which will unduly inhibit the development of DBS technology. The FCC has already recognized that the emerging business of DBS

[9/] In its Comments in the FCC's must-carry and retransmission consent rulemaking, Viacom argued that requiring abrogation of program supply contracts in favor of must-carry would constitute retroactive regulation that neither was authorized by Congress nor is otherwise permitted under the Due Process Clause of the Constitution. Comments of Viacom in MM Docket 92-259 at 10-19. Those portions of Viacom's Comments are incorporated herein by reference insofar as they are relevant to the question of whether contract abrogation may be required in favor of the noncommercial channel reservation requirements in Section 335(b). Even if the FCC continues to believe that contract abrogation does not violate due process, the equitable considerations underlying the discussion in the cases relied upon by Viacom would in any event militate against interpreting Section 335(b) as authorizing abrogation of existing contracts - - a result not mandated by the statute. See n.8, supra.

militates against imposition of public interest requirements beyond those specifically identified in Section 335 and against imposition of local broadcasting obligations. NPRM at ¶¶ 29, 36. As noted above, regulation which unduly interferes with the vital economic relationships between programmers and DBS service providers could effectively inhibit the development of DBS. Viacom submits that these considerations further militate against permitting contract abrogation in favor of Section 335(b)'s noncommercial channel reservation requirements, particularly since there is no evidence that, in the absence of contract abrogation, transponder capacity will not be available to all entities who wish to distribute noncommercial programming by means of DBS satellites.

Accordingly, Viacom recommends that the FCC (1) require Part 100 and Part 25 DBS licensees to reserve unused channels for

III. THE SECTION 335(a) POLITICAL BROADCASTING REQUIREMENTS.

A. The Definition of "Provider of Direct Broadcast Satellite Service" Should Be the Same for Purposes of Sections 335(a) and Section 335(b).

For the reasons stated above with respect to the noncommercial channel reservation requirements, Viacom submits that the FCC should adopt the least restrictive regulatory scheme possible for imposing Section 335(a)'s political broadcasting requirements on DBS service providers. To ensure this result, it is critical that the FCC narrowly and precisely define the entities to which the Section 335(a) political broadcasting requirements will apply.

Section 335(a) directs the FCC to impose "public interest or other requirements" on "providers of direct broadcast satellite service." 47 U.S.C. § 335(a). Those requirements must at a minimum include the "reasonable access" provisions of Section 312(a)(7) and the "equal opportunities" provisions of Section 315. Id. Unlike Section 335(b), Section 335(a) does not include a definition of "provider of direct broadcast satellite service." Hence, there is an issue as to whether the definitions of that term in Sections 335(b)(5)(A)(i)-(ii) should apply with respect to Section 335(a)'s political broadcasting requirements as well, even though Section 335(b)(5) states that those definitions apply for purposes of the noncommercial channel reservation requirements.[10/] The issue is of concern to Viacom since as

explained below, the Program Services would suffer considerable disruption if the FCC were to adopt a Section 335(a) definition of "provider of direct broadcast satellite service" different from that Viacom has urged for Section 335(b), which would result in Section 312(a)(7) and Section 315 being directly applicable to programmers.

Viacom supports the comments filed by Discovery Communications, Inc. insofar as they assert that the term "provider of direct broadcast satellite service" -- in both Sections 335(a) and 335(b) -- does not include programmers. Comments of Discovery at 3. A programmer is neither a "provider of direct broadcast satellite service" for purposes of Section 335(a) nor a "licensee" or "distributor" for purposes of Section 335(b). Id. Viacom further submits that the legislative history of Section 335 suggests that Congress intended uniform application of Sections 335(a) and (b) and that any definitions of "provider of direct broadcast satellite service" already in the statute should apply equally to both subsections. In Section 18 of the House Bill as reported (Section 21 as passed), subsection (a) applied to DBS "systems," whereas subsection (b) applied to "providers of DBS service." Section 18 was amended by the House Senate Conference Committee to apply both subsections to "provider(s) of direct broadcast satellite service." The Committee's amendment conforming the types of entities to which subsections (a) and (b) would apply strongly suggests that Congress intended that both subsections apply to the same types

of entities. Viacom further notes that the FCC relied on the subsection (b) definitions in concluding that both subsections (a) and (b) apply only to Ku-band facilities. NPRM at ¶ 5. Viacom sees no reason why the FCC should not also rely on the subsection (b) definitions when determining the specific entities to which subsection (a) will apply.

B. Section 335(a) Requirements Must Not Be Applied in a Manner Which Disrupts Programming or Permits Abrogation of Program Supply Contracts.

Viacom supports the Comments of Time Warner Entertainment Company, L.P. insofar as they argue that Section 335(a) does not require that a provider of DBS service satisfy its Section 312(a)(7) and Section 315 obligations on a channel-by-channel basis. Comments of Time Warner at 3. Time Warner correctly points out that application on a channel-by-channel basis would in effect impose the rules on individual programmers, since each programmer would then be required to make time available for

obligations are to be imposed on "providers of direct broadcast satellite service," not on programmers.

In addition, Viacom supports the comments of Discovery and DirecTv insofar as they recommend that the FCC accord providers of DBS service considerable discretion in determining when and where to run political advertisements pursuant to Section 312(a)(7) and Section 315, subject to the constraints discussed

Finally, should the FCC, contrary to Viacom's recommendation, adopt rules which would require programmers to comply with the political broadcasting requirements set forth in Section 335(a), Viacom requests that the FCC exempt advertiser-free premium services from those requirements. Under no circumstances should the FCC allow DBS to be used as a mechanism for requiring an "ad-free" program service to carry political advertisements. See Comments of Time Warner at 3-4; Comments of SBCA at 12-13

would be extremely difficult to devise a workable LUC formula for multichannel systems such as DBS. Hence, given the absence of clear Congressional intent with respect to LUC, the logistical problems with applying LUC to DBS, the fact that DBS service providers are already required to provide a portion of their channel capacity to noncommercial programmers at rates below cost, and the emerging nature of the DBS industry that may be adversely affected by the imposition of multiple regulatory requirements, Viacom submits that it would not be prudent for the FCC to apply its LUC requirements to DBS at this time. At most, the FCC should consider applying LUC requirements to DBS only after it has accumulated a record demonstrating that Section 315's equal opportunity requirements are insufficient to ensure that all eligible candidates have access to DBS facilities on reasonable terms.

D. Other Public Interest Requirements.

Viacom supports the FCC's tentative view that no public

25 DBS facilities if those distributors do not hold a Part 25 license. In addition, Viacom requests that the FCC apply the noncommercial channel reservation requirements in the least restrictive manner possible (i.e., by requiring that only the minimum percentage of channel capacity be reserved), and that the FCC not permit DBS service providers to abrogate their existing program supply contracts in order to satisfy such requirements. Viacom further requests that the FCC adopt the Section 335(b)(5) definitions of "provider of direct broadcast satellite service" in its regulations implementing the political broadcasting requirements in Section 335(a). The FCC should also not require DBS service providers to comply with their Section 335(a) obligations on a channel-by-channel basis, and should prohibit such providers from requiring programmers to provide reasonable access to political candidates or to comply with Section 315 equal opportunity obligations. The FCC should otherwise allow DBS service providers maximum discretion in fulfilling their Section 312(a)(7) and Section 315 obligations, subject to the constraints (including existing contractual obligations) discussed above, but should exempt from Section 312(a)(7) and Section 315 requirements channels that do not carry advertising. The FCC should also not impose lowest unit charge requirements on DBS at this time. Finally, Viacom supports the FCC's tentative view that no public interest requirements beyond those